UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

DSM PHARMA CHEMICALS – SOUTH HAVEN, INC.[1/]

Employer

and **Case GR -7-RC-22427**

LOCAL 324, A, B, C & D, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Petitioner

APPEARANCES:

Robert W. Sikkel and Jonathon Kok, Attorneys, of Holland, Michigan, for the Employer.
J. Douglas Korney, Attorney, of Bingham Farms, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record [2/] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

[1] The name of the Employer appears as amended at the hearing.
[2] The Employer filed a brief, which was carefully considered.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of approximately 72 full-time and regular part-time production and maintenance employees, including operators, lead operators, electricians, service workers, grounds employees, and warehouse employees employed by the Employer at its Michigan facility; but excluding all office clerical employees, sales employees, managerial employees, professional employees, laboratory quality control technicians (QC techs), and guards and supervisors as defined in the Act. The Employer has stipulated that the approximately 72 full-time and regular part-time maintenance and production employees should be included in the unit. However, it contends that the nine QC techs should also be included in the unit because they share a community of interest with the petitioned-for unit. There is no history of collective bargaining between the parties.

I find that the QC techs do not share a community of interest with the production, maintenance, and warehouse employees sufficient to require their inclusion in the unit over the objections of the Petitioner.

Overview of Operations

The Employer is a Delaware corporation engaged in the manufacture and non-retail sale of pharmaceutical ingredients for generic and name brand pharmaceutical companies. Its operations take place in a cluster of buildings located on 12 to 14 acres of a larger 40-acre property. These building are adjoined and include warehouse buildings, a boiler room, a manufacturing building, an office complex, a maintenance shop and a remote building for analytical service chemists. There are three labs on the premises. The research and development lab, located in the main office complex, is where chemists with degrees perform research. The analytical lab is located in the Analytical Services Building, at a remote location on the 40-acre property, where chemists also perform tests.[3] Finally, there is the QC lab, also located in the main office complex, where the nine disputed QC techs work.

The person with overall supervision for the entire site is Bill Moneypenny, the site manager. Under him, the lines of supervision separate. In the QC lab, the manager is Steve Butler.[4] Under him in the lab are supervisors Lynn Walden and Jeff Lawson.[5] The manager

[3] The parties stipulate, and I find, that the chemists in the research and development lab and the Analytical Services lab, are professional employees and are not included in the unit.

[4] The parties stipulated, and I find, that Butler and Moneypenny are supervisors within the meaning of the Act as they exercise independent judgment to direct, assign, and discipline employees.

for production, maintenance, and warehouse operations is Jos Tihjuis, who is on the same managerial level as Butler[6]. Under him in Operations are supervisors Chuck Munn, Randy Gumpert, Phil Shriver, Don Smith and Jerry Mokma.[7]

Production and Maintenance Employees

The production, maintenance, and warehouse side of the facility, which will be collectively called production, is made up of several different classifications:

1. 47 production employees, which include the operators and associate operators.
2. 13 maintenance employees, which includes a service (janitorial) employee, an electrician, mechanics and grounds keepers.
3. Four warehouse employees.

These employees share many commonalities at work. They all wear a company provided blue, two-piece uniform with work shoes and protective wear. They all get two, 30-minute breaks, are required to arrive 10 minutes prior to their shift, and are also required to take a shower before they leave the facility. They share a common seniority list, which is used for such things as vacation requests. As stated earlier, they also share the same five supervisors who approve vacations, sick days, and direct their work.

Both the production and warehouse employees work together in the same building. While the maintenance employees are located in a separate maintenance facility, they perform much of their work in the building with the production and warehouse employees.

The operators work in four crews labeled A through D. The A and B crews work the day shift from 5 a.m. to 5 p.m., and the C and D crews work the night shift from 5 p.m. to 5 a.m. Similarly, the maintenance crew has two employees who work from 5:30 a.m. to 5:30 p.m., two employees who work from 5:30 p.m. to 5:30 a.m., and a project maintenance crew that works from 6:30 a.m. to 3:30 p.m. Finally, the warehouse employees work 2 weeks at 12 hours per day, and then 2 weeks at 8 hours per day, with no night hours.

QC Techs

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[5] The parties stipulated, and I find, that Walden and Lawson are supervisors within the meaning of the Act in that they have the authority to responsibly direct employees and to effectively recommend and/or issue discipline.

[6] In its brief, the Employer contends that the warehouse employees "have their own set of supervisors" different from the production employees. However, no record evidence supports this contention.

[7] The parties stipulated, and I find, that Munn, Gumpert, Shriver, Smith, and Mokma are supervisors within the meaning of the Act as they have the authority to responsibly direct employees and to effectively recommend and/or issue discipline.

The QC techs perform analytical tests on raw materials, on in-process chemical operations, and on final product. There are three levels of QC techs, I, II and III. These levels distinguish the amount of testing experience and the complexity of the tests they perform. However, QC techs are not required to have any educational experience. A degree in chemistry is preferred, but not required.

Openings for QC tech positions are posted internally. One QC tech opening was recently posted and a clerical employee was awarded the position. Once a person is selected, they receive on-the-job training from more experienced QC techs.

The QC techs work in the QC lab that is housed in the main office building next to the manufacturing facility. They work in four crews labeled A through D, identical to the production crews. Unlike the production employees, they wear a company-provided light blue lab coat over everyday clothes with work shoes and protective wear, they get two, 20-minute breaks, are not required to arrive 10 minutes prior to their shift, and are not required to take a shower before they leave the facility. Like the production employees, they have a seniority list, but the QC list is separate from the production and warehouse list. As stated earlier, the QC techs are supervised by two supervisors and a manager, who are different than the production supervisors.

Interactions Between Classifications

The QC techs rarely enter the production or warehouse plants. They receive materials to be tested from the operators, who deliver the materials to the lab office and leave the materials on the front table in the lab. Once the test is completed, the QC tech calls the operator over the public address system, who then retrieves the materials from the lab. If there is no problem with the test, there is minimal if any interaction between the QC tech and the operator. If a problem exists, the QC supervisor, the production supervisor, a chemist, and the QC tech may interact with the operator to resolve the problem. Such problems rarely occur. The QC techs also perform water tests once a month in the production facility. Altogether, the QC techs spend approximately 90 - 95% of their time in the QC lab.

The production personnel rarely if ever go into the QC lab. As stated above, the operators leave the materials to be tested on the table in front of the lab with minimal if any interaction with the QC techs. However, some operators are required to enter the lab to place materials in a "hood," which is an airtight encasement. Recently, some operators have also been required to run tests themselves in the lab, although this is extremely rare.[8]

[8] This is a new procedure implemented on March 1, 2003. One operator testified that he had never performed this specific test. A supervisor testified that she had only one employee who performed the test.

At least six production operators and one clerical employee applied for and received QC tech positions in the past few years. Of those, two later returned to operator positions. All the employees received the same rate of pay after the transfer. However, as stated earlier, the QC techs have a different seniority list, so transfers out of production into the QC lab have the effect of freezing in-plant seniority, until (if ever) the employee returns to a production position. Transfers within production positions, to warehouse or operator positions from warehouse or operator positions, result in no loss or freezing of seniority.

Benefits

All employees, including the QC techs, receive the same benefits, including medical, dental, vision, life and disability insurance, profit sharing, and retirement (401k). All employees are on the same payroll. They all are paid bi-weekly on Wednesday, receive the same overtime pay, and are paid on an hourly basis. All employees are covered by the same handbook, and can take their lunch in a common cafeteria.

The QC techs have an hourly rate of pay ranging from $12.50 to $16.25, and operators have a rate of pay ranging from $13.30 to $21. The record does not disclose the pay rates for the other classifications.

Analysis

The Act does not require that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the petitioned-for unit be appropriate. ***Transerv Systems***¸ 311 NLRB 766 (1993); ***Morand Brothers Beverage Co.***, 91 NLRB 409, 418 (1950). In addition, the extent of organization may be taken into consideration as one of the factors in unit determination, together with other factors, provided, of course, that it is not the governing factor. ***Metropolitan Life Insurance v. NLRB***, 380 U.S. 438 (1965); ***Marks Oxygen Co.***, 148 NLRB 228, 230 (1964); ***E.H. Koester Bakery & Co.***, 136 NLRB 1006 (1962).

A major determinant in an appropriate unit finding is the community of interest of the employees involved. The Board has examined 12 factors as follows: (1) similarity in the scale and manner of determining the earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills, and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization. See e.g., ***Lundy Packing***, 68 F.3d 1577, 1580 (4th Cir. 1995); ***Home Depot USA***, 331 NLRB 1289 (2000).

In this case, all of the employees share some similarities. They are all hourly employees, earn time-and-a-half or double-time for overtime, get paid on the same day, have the same benefits, eat in the same cafeteria, park in the same parking lot, and are covered by the same employee handbook. The QC techs also work the same hours as the operators, although different than the other production employees.

On the other hand, the QC techs have different uniforms, different break times, and no pre-shift arrival requirement. QC techs have minimal, if any, interaction and perform vastly different jobs than the other employees. The QC techs have very little work contact with the employees in the plant as they spend 90-95% of their time in the lab, which is located in a separate building from the building housing the production employees. The operators in turn rarely enter the lab, except to place certain materials in glass encasements, or to conduct new and rarely used tests. No functional integration exists between the QC tech and production classifications as the classifications do not routinely, if ever, perform each other's duties. Although employees have transferred from operator positions to QC tech positions, or vice versa, there is no transfer of seniority. While none of the positions in question require a degree or experience, the QC tech position description states a preference for a chemistry degree and new hires go through on-the-job training.

The production employees are supervised by a completely different group of supervisors than the QC tech employees. Each group has their own manager and supervisors, and share only the site manager in common. As a result of separate supervision, the QC techs have their vacations and other time-off approved separately.

In ***Lundy Packing Co***., 314 NLRB 1042 (1994), the Board found that quality assurance/lab technicians need not necessarily be included in a unit of production and maintenance employees because the technicians did not share an overwhelming community of interest with the production and maintenance employees as they were supervised separately, were paid differently, had no interchange, had insubstantial and irregular contact with production and maintenance employees, and no union sought to include them in the unit. The technicians there also spent less time on the plant floor, and more time in an office recording inspection results.

Although, the Fourth Circuit Court of Appeals refused to enforce the Board's order in ***Lundy***, it relied upon, among other things, a substantial amount of time the technicians spent interacting on the production floor. 68 F.3d 1577 (1995). However here, contrary to the Employer's contention, there is no evidence that this occurs. As the QC techs spend 90-95% of their time in the lab, an area production employees rarely enter, this allows for little interaction with the petitioned-for employees. Further, there is no daily interchange of tasks or "covering" of assignments. The Fourth Circuit in ***Lundy***, also disagreed with what they viewed as the introduction of a new standard, "that any union-proposed unit is

presumed appropriate unless an 'overwhelming community of interest' exists between the excluded employees and the union-proposed unit." However, in this case, no such controlling weight is given to the union's proposed unit.

The present case is similar to the excluded quality control employees in ***Beatrice Foods***, 222 NLRB 883 (1976). In ***Beatrice***, the quality control employees worked in a laboratory and did not have regular contact with the production and maintenance personnel. The Board stated that although two of the quality control employees were connected with the production process by virtue of the fact that they tested samples of products, "whether an employee should be included in a production and maintenance unit depends not on whether the employee's job has some relationship to the production process, but on whether the employee shares a community of interest with those in the bargaining unit…. Where, as here, they are separately located, under separate supervision, and do not have regular contact with production employees, they are excluded from production and maintenance units." ***Beatrice***, 222 NLRB at 883.

Consequently, the record as a whole indicates, and I find, that the QC tech position does not share a community of interest with the petitioned-for unit sufficient to require their inclusion in the unit.

5. Based on the above, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I hereby direct an election therein:

> All full-time and regular part-time production and maintenance employees, including operators, lead operators, electricians, service workers, grounds employees, and warehouse employees employed by the Employer at its Michigan facility; but excluding all office clerical employees, laboratory quality control technicians, sales employees, managerial employees, professional employees, and guards and supervisors as defined in the Act.

Those eligible to vote shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 5th day of May 2003.

Joseph A. Barker, Acting Regional Director
National Labor Relations Board
Seventh Region
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Classification Numbers

401 2562
401 7550
420 2903
420 2921
420 2936
420 4601
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